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**BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON**

RICHARD E. GILLERAN,

Appellant,

v.

**STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,**

Respondent.

PCHB No. 92-175

**FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER**

The Pollution Control Hearings Board ("Board") heard this case on March 8, 1994, in its office in Lacey, Washington. The Board was comprised of: Robert V. Jensen, attorney member, presiding and Richard C. Kelley.

Betty J. Koharski of Gene Barker and Associates, Inc. of Olympia, recorded the proceedings.

Richard E. Gilleran ("Gilleran") was represented by Paul J. Wasson, attorney. The Department of Ecology ("Ecology") was represented by Mary E. McCrea, Assistant Attorney General.

The Board heard sworn testimony, reviewed exhibits and the briefs of the parties. Based thereon, the Board renders these:

FINDINGS OF FACT

I

Ted Holden and Larry Konen, both wildlife agents with the then, Department of Wildlife ("Wildlife"), were conducting a fishing patrol on Long Lake, near Spokane, on

1
2 March 22, 1992, in a small boat. Holden had been a wildlife agent for 12 years; Konen for 24
3 years. It was a clear day and the lake was calm.

4 II

5 They observed a small boat moving in a serpentine fashion along the south shore, about
6 400 yards away from their boat. The movement of the boat was not a typical fishing
7 maneuver. Aroused by their suspicion, they looked through the binoculars. They saw two
8 people in the boat. Holden and Konen continued observing from this distance for about four
9 to six minutes. They decided to move in the direction of the small boat. From about 200
10 yards away they were able to determine that the boat contained a man and a woman. The boat
11 was an aluminum craft, about 12 to 14 feet in length. The woman was hunched over the bow.
12 As the boat was moving, she would periodically sit up and then lean over the front, putting her
13 arms into the water. The man in the stern was controlling the movement of the boat.

14 III

15 Holden remarked: "she's spreading something on the surface of the water". They then
16 proceeded directly toward the man and woman. It became apparent to the agents that the man
17 and woman were aware that they were under observation. As a result, the boat changed
18 direction dramatically and headed for a nearby dock.

19 IV

20 The man and woman disembarked rapidly. The man grabbed a bag and carried it
21 directly to a parked vehicle. Agent Holden could tell by the way it was being carried that it
22 was heavy. The man opened the trunk, placed the bag inside and closed and locked the lid.

23 V

24 Holden and Konen sped up and docked their boat. Agent Holden observed a white
25 granular material on the lake bottom, near the dock, in about three to four feet of water.

1
2 Some of the material had stuck to stringers on the side of the dock. A similar material was
3 visible inside the aluminum boat, and within a two pound coffee can that rested in the boat.

4 VI

5 The agents were wearing their summer uniforms. They went from the dock toward the
6 vehicle into which the man had placed the bag. The man, who had gone into the house located
7 on the property, came out and asked if he could help them. The agents introduced themselves
8 and told the man what they had seen. They asked the man for his driver's license. He did. It
9 identified the man as Gilleran. The agents verified that the house was Gilleran's residence,
10 with his address being North 20504 South Bank Road, Nine Mile Falls, Washington. He was
11 later identified as a self-employed attorney.

12 VII

13 Agent Holden asked Gilleran what he and the woman were doing. Gilleran declined to
14 comment. They asked to meet and identify the woman, who had gone into the house.
15 Gilleran refused to comply with this request. When they told Gilleran that they suspected that
16 he and the woman had been putting something on the water that they should not have been,
17 and asked to see the bag, Gilleran refused their request. He stated that he wanted to speak to
18 his attorney. Gilleran left saying that he was going into the house to call the attorney.

19 VIII

20 Agent Konen gathered two samples of the white, granular material. One was from the
21 floor of the aluminum boat; the other, was from the water near the dock. He put the samples
22 in two zip-lock bags from his lunch pail. He took them to his home and placed them in a
23 refrigerator for a couple days. Konen, on March 24, 1994, delivered the samples to Mary
24 Cather of Ecology.

IX

Cather, who is a water quality specialist, packaged the two samples into a sealed ice chest. She filled out the chain of custody form and sent that, with the samples, to Ecology's laboratory in Manchester, Washington, for analysis. The ice chest was received in its sealed condition at Manchester, on March 26.

X

Norman Olson, a chemist at the Manchester laboratory, analyzed the two samples. When he received the zip-lock bags, they both had custody seals on them. He broke the seal on the first sample, which was dry. He diluted this sample to be able to make an appropriate analysis. The analysis was accomplished using capillary gas chromatography and atomic emission detection. The results were that the first sample contained 9.8% dichlobenil. Dichlobenil is an herbicide with commercial names: Caesoran and Northax.

XI

Olson broke the custody on the water sample and tested it. It registered 150 parts per million of dichlobenil. This is a magnitude of six levels above the measurable quantification level of 100 parts per trillion in water.

XII

Dichlobenil is an upland herbicide, useful for killing emergent plants. A common application is placement on the ground prior to asphaltting. Ecology has a process for permitting the placement of herbicides in water. If a permit is granted, the application must be done by a licensed applicator, following specific conditions. Among these are: limitations on the time of application; requirements for notifying the public through posting; and limitations on when people can use the water or eat fish, subsequent to an application. Gilleran never applied for, nor never obtained a permission from Ecology to apply dichlobenil to Long Lake.

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2 **XIII**

3 Application of dichlobenil to Long Lake adversely affects wildlife.

4 **XIV**

5 In the 1980's, Ecology, under the authority of an environmental impact statement
6 ("EIS"), authorized permits for the application of dichlobenil, for small, localized areas, on
7 the state's waters. In June 1989, Ecology did a supplemental EIS on plant management.
8 Based on the information then available to it, Ecology would probably not have issued a permit
9 to apply this herbicide on the state's waters. In January 1992, Ecology banned the application
10 of this herbicide to the state's waters. On February 12, 1992, Ecology held a public meeting
11 about water quality, at Nine Mile Falls, on Lake Spokane. About 40 people attended.

12 **XV**

13 Ecology determined to issue Gilleran a \$1000 civil penalty, for five violations of the
14 water quality statutes and regulations. Gilleran had not been previously been charged with
15 violating the water quality laws of the state.

16 **XVI**

17 Any conclusion of law deemed a finding of fact is hereby adopted as such. From these
18 findings of fact, the Board makes the following:

19
20 **CONCLUSIONS OF LAW**

21 **I**

22 The Board has jurisdiction over these parties and the subject matter. RCW
23 43.21B.300(1), RCW 90 48.144(3).

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II

Ecology has the initial burden of proof that the violations occurred and that the penalty is reasonable. WAC 371-08-183(3). The Board decides the matter de novo. WAC 371-08-183(2).

III

RCW 90.48.080 makes

It is unlawful for any person to throw, drain, run, or otherwise discharge into any of the waters of this state, or to cause, permit or suffer to be thrown, run, drained, allowed to seep or otherwise discharged into such waters any organic or inorganic matter that shall cause or tend to cause pollution of such waters according to the determination of the department, as provided for in this chapter. (Emphasis added).

IV

RCW 90.48.020, defines "pollution" as meaning:

such contamination, or other alteration of the physical, chemical or biological properties, of any waters of the state, including change in temperature, taste, color, turbidity, or odor of the waters, or such discharge of any liquid, gaseous, solid, radioactive, or other substance into any waters of the state as will or is likely to create a nuisance or render such waters harmful, detrimental or injurious to the public health, safety, or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life.

V

WAC 173-201A-045(5) defines the water quality standards for lakes. The "water quality of this class must meet or exceed the requirements for all or substantially all uses".

WAC 173-201A-045(5)(a). Those uses include: 1) fish migration, rearing spawning and harvesting; 2) wildlife habitat; and 3) "[r]ecreation (primary contact recreation, sport fishing, boating, and aesthetic enjoyment)". Application of the herbicide Dichlobenil, without a permit from Ecology, interferes with these uses.

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2 VI

3 WAC 173-201A-045(c)(vii) provides that:

4 *deleterious material concentrations shall be below those which have the potential either*
5 *singularly or cumulatively to adversely affect characteristic water uses, cause acute or*
6 *chronic conditions to the most sensitive biota dependent upon those waters . . .*

7 VII

8 "Deleterious" is not defined in the statute. In Webster's Third New International
9 Dictionary 596 (1971), it is defined as: "hurtful, destructive, noxious, pernicious". The
10 herbicide dichlobenil is destructive by definition, and therefore its placement in the waters of
11 the state, without Ecology's approval, is pollution.

12 VIII

13 WAC 173-201-035(8)(e) allows for modification of the water quality criteria, "for a
14 specific water body, on a short-term basis when necessary to accommodate essential activities,
15 respond to emergencies, or to otherwise protect the public interest".

16 IX

17 Ecology grants permission to apply herbicides to the waters of the state through
18 regulatory orders, under the authority of WAC 173-201-035(5)(a)(ii), WAC 173-201-035(8)(e)
19 and WAC 173-201-100(2).

20 X

21 Gilleran first argues that he should not be penalized because he did not actually place
22 the herbicide in the water. This argument is not persuasive. He was in actual physical control
23 of the boat from which the herbicide was dispensed. He thus caused the contamination of the
24 lake by this pollutant. RCW 90.48.080 establishes a strict liability standard. R. G. Leary
25 Construction Company, Inc v DOE, at 8 PCHB No. 90-1 (1990). Neither intent nor
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2 negligence are relevant. Id. (holding that a general contractor was liable for the acts of a
3 subcontractor, employee, or stranger). Moreover, Gilleran aided in withholding the
4 identification of the woman who aided him in this enterprise. He can hardly contend that he
5 was an innocent bystander.

6 X

7 Gilleran's other defense is that RCW 90.48.020 and 080 are void for vagueness and
8 overbreadth and therefore violate due process under the Fourteenth Amendment to the United
9 States Constitution. Administrative tribunals are without the authority to determine the
10 constitutionality of statutes. Yakima Clean Air v. Glascam Builders, 85 Wn.2d 255, 257, 534
11 P.2d 33 (1975). We nonetheless note that a statute is presumed to be constitutional, against a
12 challenge of vagueness, unless it appears to be unconstitutional beyond a reasonable doubt.
13 State v. Halstien, 122 Wn.2d 109, ___ P.2d. ___ (1993). The challenging party therefore
14 carries the burden of proving the unconstitutionality. Id. A fair reading of the statutes and
15 regulations is sufficient to put the average person on notice that placement of herbicides in the
16 waters of the state would constitute pollution, unless otherwise determined by Ecology.

17 XII

18 Overbreadth challenges, address the issue of substantive due process. Stastny v. Board
19 of Trustees, 32 Wn. App. 239, 254, 647 P 2d 496 (1982). This raises the question of whether
20 the statute is so broad as to prohibit constitutionally protected activity. Id. Pollution is not a
21 constitutionally protected activity, so the doctrine should not apply.

22 XIII

23 The maximum penalty allowed per violation is \$10,000. RCW 90.48.144. Ecology
24 issued its fine based on the violations of one statute and four regulatory provisions. Ecology
25 proved that Gilleran illegally polluted the waters of the state; that he illegally placed an
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2 herbicide in Long Lake without permission from Ecology; and that his actions interfered with
3 the uses of the lake. The maximum penalty for the violations proved by Ecology, would be
4 \$30,000. Because this was the first violation, Ecology viewed the \$1000 as sufficient to obtain
5 the objective of compliance with the law. We conclude that this was a serious violation, and
6 that the \$1000 civil penalty was reasonable, under the circumstances.

7 **XIII**

8 Any finding of fact deemed to be a conclusion of law is hereby adopted as such. From
9 the foregoing, the Board issues this:

1
2 **ORDER**

3 The \$1000 civil penalty is affirmed.

4 DONE this 22nd day of April 1994.

5
6 **POLLUTION CONTROL HEARINGS BOARD**

7 
8 ROBERT V. JENSEN, Presiding Officer

9 
10 RICHARD C. KELLEY, Member

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12 P92-175F